FILED
MAR 28 1952
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1951

No. 975

TWENTIETH CENTURY-FOX FILM CORPORATION, ET AL.,

Petitioners,

against

BROOKSIDE THEATRE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Twentieth Century-Fox Film Corporation, Paramount Pictures, Inc., Loew's Incorporated, RKO Radio Pictures, Inc., Warner Bros. Pictures, Inc., Warner Bros. Theatres Distributing Corporation, Columbia Pictures Corporation, Universal Film Exchanges, Inc., and United Artists Corporation,

Petitioners.

By: JOHN P. CARNEY,
DUDLEY SHARPLES,
WILLIAM E. KNOX,
Attorneys for Petitioners.

March 28, 1952.

TABLE OF CONTENTS

	PAGE
Statement Under Rules 27(d) and 38(2)	1
The *Paramount* case	4
Proof of Damages	5
Statute of Limitations	8
Opinions Below	10
Jurisdiction	10
Questions Presented	10
Reasons for Allowance of the Writ	12
Conclusion	19

TABLE OF CASES

PAGE

Emich Motors v. *General Motors*, 340 U. S. 558 (1951) 4, 11, 12, 13, 14

Fifth and Walnut v. *Loew's, Inc.* (S. D. N. Y., 1948, Civ. No. 36-736, unreported) 19

National Supply Co. v. *Hillman*, 57 F. Supp. 4 (W. D. Pa., 1944) 19

N. Y. Central R. R. Co. v. *Johnson*, 279 U. S. 310 (1929) 12

Rolsky v. *Fox Midwest Theatres*, C. C. H. Trade Reg. Serv., Court Decisions Supplement, 1932-1937 Para. 7484 (D. Mo., 1936) 3, 11

Russellville Canning Co. v. *American Can Co.*, 87 F. Supp. 484 (W. D. Ark., 1949) 19

Story Parchment Co. v. *Paterson Co.*, 37 F. 2d 537 (C. C. A. 1st, 1930), 282 U. S. 555 (1931) 15

Tiffin Building Corp. v. *Balaban & Katz Corp.*, 87 F. Supp. 121 (N. D. Ill., 1949) 19

U. S. v. *American Society of Composers, Authors and Publishers, et al.*, C. C. H. Trade Reg. Serv., Para. 62,594 (S. D. N. Y., 1950) 18

U. S. v. *Libbey-Owens-Ford Glass Co.*, C. C. H. Trade Reg. Serv., Para. 62,323 (N. D. Ohio, 1948) 18

U. S. v. *Owens-Corning Fiberglas Corp., et al.*, C. C. H. Trade Reg. Serv., Para. 62,442 (N. D. Ohio, 1949) .. 18

United States v. *Smith*, 342 U. S. 225 (1952) 19

United States v. *Swift & Co.*, 286 U. S. 106 (1932) 17

United West Coast Theatres Corp. v. *South Side Theatres*, 86 F. Supp. 109 (S. D. Calif., 1949) 19

Winkler-Koch Engineering Co. v. *Universal Oil Prod. Co.*, 96 F. Supp. 1015 (S. D. N. Y., 1950) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

TWENTIETH CENTURY-FOX FILM CORPORATION, *et al.*, *Petitioners,* —*against*— BROOKSIDE THEATRE CORPORATION, *Respondent.*	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court:

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on February 11, 1952.

STATEMENT UNDER RULES 27(d) AND 38(2)

This is a suit for treble damages under Section 4 of the Clayton Act (38 Stat. 731, 15 U. S. C. Section 4).

Respondent is a Missouri corporation organized in July, 1936. In September of that year it became the lessee of the

neighborhood Brookside motion picture theatre in Kansas City, Missouri. The lease was for a fifteen-year term commencing March 1, 1937. Respondent operated the theatre from March 6, 1937, to November 22, 1937. On November 22, 1937, plaintiff assigned the lease of the theatre and sold its equipment to a corporation in which the petitioner Twentieth Century-Fox had a minority interest for a consideration of approximately $43,300 (R. 2125) which sum returned its two stockholders their full investment and a profit.* Subsequent to the assignment of the lease respondent's only stockholders permitted its charter to be forfeited under the Missouri statutes and the corporation conducted no business after November, 1937 (R. 860, P. Ex. 85). The forfeiture was cancelled in June, 1949, and plaintiff brought this action on June 27, 1949.

The petitioners are distributors of motion pictures, each of which maintains a sales office in Kansas City, Missouri.

The crux of plaintiff's complaint is that after the formation of the corporation in 1936, Fulton and Schwartz, its sole stockholders, attempted to secure pictures from all of the defendant distributors for the 1936-1937 season. Plaintiff claimed that it was unable to secure any pictures because of an exclusive agreement which the defendant distributors had with the operators of the Waldo theatre in Kansas City. Plaintiff claimed that as a result of a conspiracy between the defendant distributors it was unable to secure pictures for its theatre or was unable to obtain pictures to play as early as it desired and was

---

*The actual purchaser was The Lufton Corporation and the operator Fox Kansas City Corporation, both wholly owned subsidiaries of Fox Midwest Theatres, Inc., which was a wholly owned subsidiary of National Theatres Corporation. From 1937 to 1943 National was a partially owned non-controlled subsidiary of Twentieth Century-Fox and thereafter a wholly owned subsidiary. None of these corporations was made a defendant. For convenience in this petition the operator of the theatre will be called Fox Midwest.

forced to assign its lease and to sell its equipment to Fox Midwest. It was further claimed that because of the forced sale, it had lost the profits which it would have made had it continued to operate the Brookside until the expiration of its lease.

Defendants denied the allegations of the complaint and contended that they had acted independently in dealing with the Brookside theatre. In support of this contention they offered in evidence the decision in *Rolsky* v. *Fox Midwest Theatres*, C. C. H. Trade Reg. Serv., Court Decisions Supplement, 1932-1937, Para. 7484 (D. Mo., 1936). This case was brought by independent exhibitors in Kansas City to enjoin these same defendants from licensing pictures by the identical method of which the Brookside complains in this action. The court, in the *Rolsky* case, held that the distributors had not violated the anti-trust laws; that each distributor had acted independently in licensing its pictures and that there was no conspiracy. The trial court refused to permit the defendants to introduce the decision in the *Rolsky* case or the issues therein and refused to permit petitioners' branch managers to testify that in dealing with the Brookside they believed that, under the decision in the *Rolsky* case, the method of distribution was lawful.

On the trial of the action, plaintiff recovered treble damages totaling $1,125,000. On the appeal by the defendants, the defendants contended that the verdict and the judgment were the result of, among other things, errors committed by the trial court with respect to the admissibility in evidence of the proceedings in *United States* v. *Paramount* and the references to those proceedings by plaintiff's counsel and the court, the measure of damages and the erroneous ruling of the trial court on the statute of limitations. The Court of Appeals affirmed the judgment of the District Court *in toto* except that it reduced the attorney's fee allowance by one-third.

The *Paramount* case

During the trial the court permitted plaintiff's attorney to refer to *United States* v. *Paramount* in his opening and closing statements, to recite at length his version of the charges made by the United States and to tell the jury that the defendants had lost the case after ten years of litigation including two unsuccessful appeals to the Supreme Court of the United States (R. 171-176). The trial court permitted the introduction in evidence of the original petition, the bill of particulars, the amended and supplemental complaint, the findings of fact and conclusions of law, the final decree against Columbia, Universal and United Artists and the final decree against Loew's, Warners, Twentieth Century-Fox and National Theatres (R. 246-248). Plaintiff's counsel read forty-eight of the findings of fact and certain conclusions of law in the *Paramount* case to the jury (R. 220-237, 245-248). The conclusions referred to National Theatres, not a defendant in the action, and to Paramount and RKO, although the court had excluded from evidence the decrees entered as to those defendants. In addition plaintiff's counsel was permitted to examine certain of defendants' witnesses as to whether they had given the same testimony in the *Paramount* case (R. 2422-2423, 1503) and then to state to the jury that defendants had not been believed in that action (R. 2496, 2562-2564, 2568). The court allowed the answers to interrogatories filed by various defendants in the *Paramount* case to be received in evidence against the defendants (R. 286).

The Court of Appeals relying on *Emich Motors* v. *General Motors*, 340 U. S. 558 (1951), held that the introduction of the primary record in the *Paramount* case was proper in the light of the court's instructions to the jury that they could not find a verdict in favor of plaintiff simply because the defendants had been unsuccessful litigants in the *Paramount* case. The

opinion made no mention of the other references to the *Paramount* case during the trial and held that there had been no error in the trial court's treatment of the *Paramount* case.

Proof of Damages

To prove its damages, plaintiff introduced the amount of profits made and estimated to be made by Fox Midwest (which was not a defendant) in operating the Brookside theatre during the period subsequent to plaintiff's assignment of the lease up until the future expiration date of the lease on February 28, 1952. Plaintiff's accountant testified that from November 20, 1937, to August 18, 1950, the date of his audit, the net profits realized from the operation of the Brookside theatre were $317,478.02 (R. 729). This figure, unsupported by the Fox Midwest books, was derived by disallowing certain expenses carried on those books, including all depreciation, maintenance of a pension fund, administrative expenses, interest and income taxes. In addition, plaintiff projected a hypothetical earning figure of $64,000 from August 18, 1950, to the expiration of the lease on February 28, 1952 (R. 2514). The sum of these two amounts equals approximately $380,000. The jury's verdict was $375,000.

Throughout the trial the defendants contended that future profits were not the proper measure of damages but that any damages suffered by the plaintiff should be measured as of the date of the sale. In support of this contention defendants introduced evidence to show the market value of the lease on the date of the sale. Defendants' theatre expert testified uncontradicted that the value of a theatre operated on a leasehold was approximately four times its annual earnings (R. 2352). The case, however, was tried on the theory that plaintiff was entitled to have considered, in determining

its damages, the profits it might have made down to the expiration of its lease in 1952 and that these profits could be measured by the profits actually realized by Fox Midwest plus the projected profits for the remainder of the lease based on the earnings realized during the first 33 weeks of 1950. This theory was apparently interpreted by the jury to give plaintiff all of Fox Midwest's profits for the fifteen year period. The theory completely ignored the unforeseeable change in economic circumstances produced by the wartime economy. The evidence produced by both plaintiff and defendants revealed that from 1938 until 1941 Fox Midwest either lost money on its operation of the Brookside (D. Ex. 84) or, according to plaintiff's testimony, made an inconsequential profit of $19,603.52 for the four year period (R. 723-726).

The Court of Appeals rejected defendants' arguments with respect to the measure of damages and held that because the judge had instructed the jury that profits derived by Fox Midwest were only one of the elements to be considered in determining damages suffered by the plaintiff, there had been no error. But the amount of the verdict clearly indicates that the jury considered no other element in determining damages and in effect awarded plaintiff Fox Midwest's profits.

The Court of Appeals states in its opinion that the defendants cannot object to the theory of damages advanced by the plaintiff or to the judge's charge on damages because of a request to charge submitted by the defendants which asked the court to charge the jury that they might take into consideration the amount of the net earnings of the Brookside theatre for the period it was operated prior to the sale on November 20, 1937, and also the earnings of that theatre for a reasonable period of time following the sale as would indicate the earning power of the theatre when operated free from the effects

of the conspiracy. The history of this request clearly shows that by making this request defendants were in no way acquiescing in the introduction of Fox Midwest's profits in evidence or the charge with respect thereto. After a pre-trial conference at which the conflicting propositions on the proper theory of the measure of damages were argued, the court filed a memorandum in which it stated its theory of damages (R. 129). Under this theory the plaintiff would be allowed to present to the jury "the loss of profits which the plaintiff may have sustained during the time of the lease as an element to be considered in determining the amount of damage to its business" (R. 129). Repeatedly during the trial, this theory of the measure of damages was challenged by the defendants and adhered to by the court. At the end of the trial, counsel for both parties submitted requests for instructions with respect to damages. At a hearing in chambers on these requests the court informed defendants that it proposed to adhere to its theory that the total earnings of the Brookside theatre, actual and projected, were an element which the jury might consider. Accordingly, after this ruling, counsel for the defendants presented a revised request which endeavored to incorporate the court's ruling in a manner which would be least prejudicial to defendants. This revised request cannot now constitute an estoppel or acquiescence by the defendants in the court's theory of the measure of damages. The court and plaintiff's counsel were fully apprised of the basis of defendants' objections. This is all the rules require.

It is obvious from the verdict of the jury that the jury interpreted the judge's charge as allowing them to assess damages in the amount of the profits made by Fox Midwest during its operation of the Brookside. Plaintiff's accountant had testified that on August 18, 1950, Fox Midwest should "have in the bank"

$317,478.02.* The hypothetical projected profits for the period from August 18, 1950, to February 28, 1952, were $64,000. The amount of the verdict given by the jury was $375,000.00. There can be no doubt that what the jury actually gave plaintiff was the amount of profits made by Fox Midwest during its operation of the Brookside.

Statute of Limitations

Petitioners RKO, Paramount, Twentieth Century-Fox, Loew's and Warners seek review on the additional ground that plaintiff's cause of action was barred by the three-year statute of limitations of the State of California.** The complaint was filed on June 27, 1949. Plaintiff's cause of action accrued on November 20, 1937. The trial court ruled that, although the California statute applied, the running of the statute of limitations had been tolled by the pendency of *United States* v. *Paramount Pictures* pursuant to Section 5 of the Clayton Act.

On July 20, 1938, the United States filed a petition in equity against RKO, Paramount, Twentieth Century-Fox, Warner, Loew's and other companies, and after nearly two years of preparation, the trial was begun in June, 1940. At the conclusion of the opening statements by counsel and prior to the taking of any testimony, the trial was adjourned for the purpose of permitting the Government and certain of the defendants, including these five petitioners, to negotiate a consent decree. These negotiations continued until the latter part of

---

*This figure should never have been mentioned to the jury. It was not "profit" and to call it such "before depreciation" and other charges was misleading and highly prejudicial.

**The action was originally brought in the United States District Court for the Southern District of California, and was transferred on defendants' motion under 28 U. S. C. Section 1404(a) to the United States District Court for the Western District of Missouri.

October, 1940, when a proposed consent decree was presented to the court and the court set November 14, 1940, as the date for a hearing. Thereafter, on November 14, 1940, the United States filed an amended complaint and in the prayer for relief asked for "a final decree". On November 20, 1940, these defendants and the Attorney General of the United States, with the approval of the court, consented to the entry of a decree.

On August 7, 1944, the United States filed an application for modification of the Consent Decree. An expediting certificate was filed by the United States and hearings were held before a Three-Judge Statutory Court. On June 11, 1946, that court rendered its opinion, and on December 31, 1946, findings of fact and conclusions of law were made and a decree was entered which set aside the provisions of the 1940 Decree. On appeal, the Supreme Court affirmed in part, reversed in part and remanded to the District Court.

On November 8, 1948, prior to the taking of any testimony on the remand, a final decree was entered, by consent, as to RKO, and as to Paramount a consent decree was entered before any decision was rendered on the proceeding after the remand. The proceedings on the remand were pending against Twentieth Century-Fox, Loew's and Warner on the date when plaintiff commenced this action.

Petitioners contend that the *Paramount* case was not pending from November 20, 1940, the date of the Consent Decree, until August 7, 1944, the date of the Government's application to modify the Consent Decree. That is, they say that the statutes of limitation were running against the plaintiff during this period of three years and eight months.

Moreover, it is the contention of petitioners that the Wartime Suspension Act, effective October 10, 1942, did not toll statutes of limitation applicable to private actions under the anti-trust laws.

Both the trial court and the Court of Appeals held that the 1940 Consent Decree was not a final decree which terminated the litigation. It was therefore unnecessary for either court to rule on whether the Wartime Suspension Act applied to all anti-trust cases or simply those actions instituted by the Attorney General.

OPINIONS BELOW

The District Court rendered no opinion. Its judgment (R. 2670) is unreported. The opinion of the Court of Appeals appears at pages 4-25 of Vol. IX of the record and is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1952 (R. Vol. IX, pp. 25, 26). The jurisdiction of this Court is indicated under 62 Stat. 928, 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erroneously sanctioned the manner in which the trial court permitted references to *United States* v. *Paramount* in (a) the opening argument of counsel, (b) in the admission of evidence during the trial of the case and (c) in the closing argument of counsel although the procedure followed contravened the procedure established for the use of a decree under Section 5 of the Clayton Act?

2. Whether the court below erroneously sanctioned the judge's charge with respect to the *Paramount* case, which

charge violated the rule established by this Court in *Emich Motors* v. *General Motors*, 340 U. S. 558 (1951), by leaving the determination of the *prima facie* estoppel to the jury rather than informing them of the facts which constituted that estoppel?

3. Whether the decision below adopted an erroneous measure of damages which resulted in permitting plaintiff to recover all of the profits made by a subsidiary of a defendant during the period of a leasehold rather than the fair market value of its lease at the date of the "forced" sale?

4. Whether the court below and the trial court, in construing the 1940 Consent Decree entered into by five of the petitioners and the United States Government in *United States* v. *Paramount*, erred in holding that said Decree was not final because this Decree contained a three year "trial period" and was subsequently modified on application of the Attorney General?

5. Whether the Wartime Suspension Act was intended to apply to anti-trust actions brought by private litigants as well as actions brought by the United States Government?

If the petition is granted, the petitioners will also argue:

6) That the Court of Appeals erred in sanctioning action by the District Court in excluding from the jury the fact that in August, 1936, the United States District Court for the Western District of Missouri in an action then pending, entitled *Rolsky* v. *Fox Midwest Theatres*, in which counsel for the present respondents was counsel for the plaintiffs, determined that the method of licensing motion pictures in issue in this case was lawful.

7) That the Court of Appeals erred in sanctioning the action of the District Court in denying a mistrial of this action and in denying a new trial because of the inflammatory and scandalous closing arugment of one of plaintiff's attorneys. *N. Y. Central R. R. Co.* v. *Johnson,* 279 U. S. 310 (1929).

REASONS FOR ALLOWANCE OF THE WRIT

1. The manner in which the trial court permitted *United States* v. *Paramount* to be referred to throughout the trial and in its charge to the jury contravened the rule established by this Court in *Emich Motors* v. *General Motors,* 340 U. S. 558 (1951).

Section 5 of the Clayton Act provides that a final decree or judgment entered against a defendant in any proceeding brought by the Government under the anti-trust laws shall be *prima facie* evidence against that defendant in any subsequent action brought by any other plaintiff under the anti-trust laws as to all matters which would be an estoppel as between the Government and the defendant. This Court has construed this section and outlined the proper procedure for dealing with a government decree in the *Emich* case. In that case the proposed treatment of a prior government decree ranged from petitioners' contention that the entire record in the government case should be admissible in the private action to the respondents' contention that none of the proceedings in the prior action was admissible. This Court carefully reviewed the history of Section 5 and concluded that the decree or judgment could be introduced as an estoppel to questions "distinctly put in issue and directly determined in the prior action." The determination of what was established in the prior suit was expressly

deemed by this Court "a question of law as to which the *court** must instruct the jury" (340 U. S. 571). In the very words of this Court, *"It is the task of the trial judge** to make clear to the jury the issues that were determined against the defendant in the prior suit, and to limit to those issues the effect of that judgment as evidence in the present action." (Ibid.) In summarizing the procedure to be followed in a subsequent action this Court stated that *the trial judge* should examine the record in the prior case, instruct the jury as to the issues determined and explain the scope and effect of that judgment on the case at trial.

There can be little doubt that the *Emich* case places the burden of informing the jury of the issues in the prior case on the trial judge and on no other person. This procedure was radically departed from in the instant case. Plaintiff's counsel was permitted to present to the jury his own interpretation of the issues tried and determined in the *Paramount* case. He was permitted to give his version of the history of that case; to inform the jury that some of defendants' present attorneys had also been their attorneys in the *Paramount* case; that defendants had been found "guilty" and branded as "monopolists" and "law breakers". There is absolutely no authority in the *Emich* case for such unorthodox use of a prior judgment.

Similarly, the reading of the findings of fact and conclusions of law entered in the *Paramount* case to the jury by plaintiff's attorney invaded the province of the court as established in the *Emich* case. The *Emich* case involved the use of a criminal judgment. Consequently this Court did not have the problem of the treatment of findings and conclusions directly before it. Yet there can be no doubt that the estoppel established by any findings is a question of law for the Court and not the jury. By permitting an indiscriminate

*Emphasis supplied.

reading of the findings to the jury, the Court allowed the jury to consider findings as to which there could not be any estoppel. Many of these findings were not ultimate facts but merely evidentiary facts which could not constitute any estoppel in a subsequent action. The Court of Appeals' condonation of this procedure squarely conflicts with this Court's decision in *Emich Motors* v. *General Motors.*

There are now pending in the several district courts about 150 actions against these defendants which involve charges of conspiracy based in part on the conspiracy found in the *Paramount* case. If the decision in the instant case is not reviewed, it will be urged by plaintiffs' attorneys, in these other actions, that the procedure adopted in this case with respect to the treatment of *United States* v. *Paramount* should be followed. It will be urged, in these other cases, that attorneys are entitled to usurp the functions of the court and inform juries in any manner they desire of the determinations in that case. This would be clearly contrary to the limited use of a prior decree and judgment permitted under Section 5 as construed by this Court in the *Emich* case. It would constitute complete disregard of the determinations there made.

2. The trial court permitted plaintiff to introduce evidence of the profits realized by Fox Midwest during its operation of the Brookside although there is no evidence that any defendant, including Twentieth Century-Fox, ever got a cent of such profits.* The reception of this evidence and the charge with respect thereto permitted the jury to award plaintiff loss of future profits as its measure of damages rather than the differ-

*As pointed out in the footnote on p. 2 of this petition, the actual purchaser was The Lufton Corporation, a subsidiary of Fox Midwest. There was no evidence that either of the corporations ever declared any dividends which were paid to Twentieth Century-Fox.

ence, if any, between the fair market value on the date of the sale and the amount which plaintiff actually received.

In *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555 (1931), it is clear that in a situation where a plaintiff in an anti-trust action has been "forced" out of business by reason of a conspiracy in violation of the anti-trust laws, that plaintiff may recover (1) loss of profits during the time when it was in business and (2) the diminished value of its business *measured as of the date of its abandonment.* Plaintiff in the *Story Parchment* case brought its action under the anti-trust laws, claiming that the defendants had conspired to reduce the price of parchment paper in order to *force* the plaintiff out of business and that as a result of that conspiracy it was *forced* out of business. The trial court submitted two items of damage to the jury: (1) the difference, if any, between the amounts actually realized by plaintiff from sales made by it when it was operating and what it would have realized from those sales at reasonable prices except for the unlawful acts of the defendants, and (2) the extent to which the value of plaintiff's property, a specially constructed plant, had been diminished as a result of the unlawful acts. The jury returned a verdict for the plaintiff in the amount of $65,000. The Circuit Court of Appeals reversed (37 F. 2d 537 [C. C. A. 1st, 1930]), but the Supreme Court reinstated the verdict.

Although the trial court in the instant case correctly ruled that plaintiff was not entitled to recover loss of prospective profits, the effect of the reception of the evidence of profits permitted plaintiff to measure its damage as of the date of the trial rather than at the date of its sale.

This violated the rule of the *Story Parchment* case that a person who has suffered damage as a result of wrongful conduct may at his election follow either of two courses: (1)

he may continue to operate the business and sue for loss of profits; or (2) he may terminate his interest in the business and sue to recover the depreciated value of his business. He may not elect to abandon his business and sue to recover loss of *future* profits. That is what the trial court permitted plaintiff to do in this action.

The Court of Appeals assumes in its opinion that because the trial court instructed the jury that the profits and projected profits were one of the factors to be considered in determining the value of plaintiff's property on the date of sale, there was no error. The verdict of the jury clearly indicates that this instruction was completely disregarded by the jury and the damages awarded were in fact "the profits" realized by Fox Midwest's operation of the Brookside.

If the jury had determined the value of plaintiff's business as of the date of the sale, the excessive verdict brought in by the jury could not have resulted. The defendants' evidence showed that the standard value of a theatre leasehold is four times its annual earnings. The verdict rendered by the jury was far in excess of four times the annual earnings of the Brookside, even during that period when it was operated by Fox Midwest.

Moreover, if the jury had determined the value of plaintiff's business as of the date of the sale, evidence of the economic conditions existing in 1937 at the time of the sale (R. 1956, 1969) would have compelled a lower verdict. In 1937 no reasonable person could have foreseen the drastic change in economic conditions which occurred in the forties. The verdict of the jury is proof that it did not value the Brookside theatre in the light of conditions existing at the time of the sale but valued the theatre in the light of unforeseeable conditions which resulted from the impact of a wartime economy.

If this decision is permitted to stand, it may be interpreted in future cases as allowing a jury to determine damages resulting from a "forced" sale or destruction of property as of the date of the trial rather than the date of the sale or destruction. This theory is not supported by the decisions and is opposed to principles of justice.

3. The ruling of the court below that the 1940 Consent Decree entered against five of these petitioners in *United States* v. *Paramount* was not a final decree completely ignores the character and nature of a consent decree. This Court has consistently recognized that in legal effect a consent decree is indistinguishable from a contested decree. *United States* v. *Swift & Co.*, 286 U. S. 106 (1932).

The Court of Appeals assumed that, because the Consent Decree entered in the *Paramount* case reserved to the United States the right at the end of three years to apply for further relief, the litigation was not terminated. The lack of logic in this assumption is patent.

If the Government had been satisfied that the 1940 Consent Decree restored competition and had not moved in 1944 to modify the Decree, no one would argue that the Decree was not final and that the statute was tolled forever. Suppose that the Government had decided to file a new complaint making substantially similar charges: such action could not be used in any way to argue that the 1940 Consent Decree was not final. Instead of doing that, the Government recognized that the Consent Decree was final and that there was no proceeding pending against the five defendants. Knowing that an estoppel existed as to certain trade practices alleged in the amended petition of November 14, 1940, upon which the Consent Decree had been entered, and desiring to rely on evidence as to those practices

as showing the necessity for divorcement, divestiture and dissolution, it moved to modify the Decree.

Economic conditions, today, require the inclusion of a trial period in which to give defendants a reasonable time to correct the alleged evils of an industry before the Government seeks by modification of a decree or by new proceedings further and more drastic relief. Many consent decrees entered into today contain similar provisions. See consent decrees entered in *U. S. v. Libbey-Owens-Ford Glass Co.*, C. C. H. Trade Reg. Serv., Para. 62,323 (N. D. Ohio, 1948), which provides for a three year trial period, the consent decree in *U. S. v. Owens-Corning Fiberglas Corp., et al.*, C. C. H. Trade Reg. Serv., Para. 62,442 (N. D. Ohio, 1949), which provides for a five year trial period, and the consent decree in *U. S. v. American Society of Composers, Authors and Publishers, et al.*, C. C. H. Trade Reg. Serv., Para. 62,594 (S. D. N. Y., 1950), which provides for a five year trial period.

This Court has not previously determined the effect of this type of provision on the finality of a consent decree. It is strongly urged that if the decision below is not reviewed the Government's future use of consent decrees will be seriously hampered. To hold that insertion in a consent decree of a clause preventing the Government from applying for further relief within a designated period, leaves the case pending against the defendants and tolls the running of the statute of limitations, would tend to discourage the entry of consent decrees. This result will be contrary to the clear intent expressed by Congress in adopting Section 5 of the Clayton Act.

4. Both courts below, erroneously assuming that the *Paramount* case was pending from 1940 until the entry of the final decree, avoided determining whether the Wartime Sus-

pension Act (56 Stat. 781, as amended by 59 Stat. 306) was intended by Congress to toll the statutes of limitation applicable to actions by *private parties* under the anti-trust laws.

The lower court decisions of other courts are not uniform. Judge Leibell, in *Fifth and Walnut* v. *Loew's, Inc.* (S. D. N. Y., 1948, Civ. No. 36-736, unreported), held that in his opinion, "the statute of limitations that was supposed to be suspended was one in reference to Government prosecutions and Government civil suits." See, also, *National Supply Co.* v. *Hillman,* 57 F. Supp. 4 (W. D. Pa., 1944). Decisions in other courts have reached a contrary result. See *Tiffin Building Corp.* v. *Balaban & Katz Corp.,* 87 F. Supp. 121 (N. D. Ill., 1949); *United West Coast Theatres Corp.* v. *South Side Theatres,* 86 F. Supp. 109 (S. D. Calif.,1949); *Russellville Canning Co.* v. *American Can Co.,* 87 F. Supp. 484, 500 (W. D. Ark., 1949); and *Winkler-Koch Engineering Co.* v. *Universal Oil Prod. Co.,* 96 F. Supp. 1015 (S. D. N. Y., 1950).

Petitioners strenuously urge that the legislative history of the Act clearly indicates that Congress intended this statute to toll only those statutes applicable to criminal prosecutions and civil proceedings by the United States. Although the precise question has not been determined by this Court, the recent decision in *United States* v. *Smith,* 342 U. S. 225 (1952), gives some indication of this Court's belief as to the intent of a similar Wartime Suspension Act. It is of utmost importance that this Court determine the intent of Congress in passing this statute.

CONCLUSION

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court,

directed to the Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all of the proceedings herein, and to the end that the judgment of said Court of Appeals may be reversed by this Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem just; and your petitioners will ever pray.

TWENTIETH CENTURY-FOX FILM CORPORATION
PARAMOUNT PICTURES INC.
LOEW'S INCORPORATED
RKO RADIO PICTURES, INC.
WARNER BROS. PICTURES, INC.
WARNER BROS. PICTURES DISTRIBUTING CORPORATION
COLUMBIA PICTURES CORPORATION
UNIVERSAL FILM EXCHANGES, INC.
UNITED ARTISTS CORPORATION
Petitioners.

By: JOHN F. CASKEY,
BYRON SPENCER,
WILLIAM E. KEMP,
Attorneys for Petitioners.

21

Supreme Court, U. S.
FILED
APR 14 1952
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 674.

TWENTIETH CENTURY-FOX FILM CORPORATION ET AL., PETITIONERS,

VS.

BROOKSIDE THEATRE CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM G. BOATRIGHT,
Suite 1411 Commerce Building,
Kansas City, Missouri,

NICK C. SPANOS,
Suite 604 Chapman Building,
Los Angeles, California,

ARTHUR C. POPHAM,
Suite 1111 Scarritt Building,
Kansas City, Missouri,

Attorneys for Respondent.

INDEX

Statement 1

Paramount Case 7

A. The trial court correctly and carefully declared to the jury, insofar as relevant to the case on trial, what was determined in the Paramount case and its significance as prima facie evidence 7

B. There was no error in allowing counsel to correctly refer to the Paramount case, either in opening statements or in closing arguments; nor any error in allowing counsel to read to the jury carefully selected findings of fact from the Paramount case as part of the explanation of the prior Government anti-trust action 10

C. A witness may be impeached by his former testimony and a party's admissions against interest in former litigation may be shown; the fact that such testimony or admissions occurred in the Paramount case does not make them incompetent 16

Damages 18

Loss of profits, resulting from tortious destruction or interruption of a business is a proper element for the jury to consider in assessing damages 18

Statute of Limitations 23

A. The interlocutory or interim decree of November 20, 1940, did not terminate the pendency of the Paramount case; it was merely an auxiliary enforcement procedure adopted for a limited time and concluded nothing 23

B. Neither court below had any occasion to consider and did not consider whether the Wartime Suspension Act applies to private parties under the anti-trust laws 27

Conclusion 29

CASES CITED

Allison vs. Chandler, 11 Mich. 542 21
Berman vs. United States, 302 U. S. 211, 58 S. Ct. 164 23
Bigelow vs. RKO Pictures, 327 U. S. 251, 66 S. Ct. 574 20
Chapman vs. Kirby, 49 Ill. 211 21
Christensen vs. Paramount Pictures, 95 F. Supp. 446 27
Emich Motors Corp. vs. General Motors Corp., 340 U. S. 558, 71 S. Ct. 408 7
Ex parte Munford, 57 Mo. 603 23
Fifth and Walnut, Inc., et al. vs. Loew's, Inc., et al., 76 F. Supp. 64, 68 (D. C. S. D. N. Y., 1948) 28
Loew's, Inc., vs. Milwaukee Towne Corp., No. 454 20
People's Ice Co. vs. Steamer Excelsior, 44 Mich. 229 22
Russellville Canning Co. vs. American Can Co., 87 F. Supp. 484 (D. C. W. D., Ark.) 28
Simmons Co. vs. Grier Bros. Co., 258 U. S. 82, 42 S. Ct. 196 23
Sinclair Refining Co. vs. Jenkins Petroleum Process Co., 289 U. S. 689, 53 S. Ct. 736 22
St. Louis Amusement Co. vs. Paramount et al., 168 F. 2d 998 (C. C. A. 8) 26
Story Parchment Co. vs. Paterson Co., 282 U. S. 555, 51 S. Ct. 248 20
Suckow Borax Mines Consol. vs. Borax Consolidated, 185 F. 2d 196 (C. C. A. 9) 28
Theatre Investment Co. vs. RKO, (D. C. E. D., Wash.) Unreported, Vol. 11, Reporter's Transcript of Trial Proceedings, October 17, 1946, pp. 1115-18 28
Tiffin Building Corp. vs. Balaban & Katz Corp., 87 F. Supp. 121 (D. C. N. D., Ill., 1949) 28
United States vs. Paramount, 334 U. S. 131, 68 S. Ct. 915, affirming in part and reversing in part 66 F. Supp. 323 ..... 2, 20, 25, 26
United States vs. Paramount, 85 F. Supp. 881, affirmed in 339 U. S. 974, 70 S. Ct. 1032, rehearing denied 71 S. Ct. 70 2

United States vs. Socony-Vacuum Oil Co., Inc., 310 U. S. 150, 60 S. Ct. 811 13
United States vs. Swift & Co. et al., 286 U. S. 106, 52 S. Ct. 460 25
United West Coast Theatres Corp. vs. South Side Theatres, 86 F. Supp. 109 (D. C. S. D., Cal., 1949) 28
Weinman vs. De Palma, 232 U. S. 571, 34 S. Ct. 370 21
Winkler-Koch Eng. Co. vs. Universal Oil Prod. Co., 96 F. Supp. 1014 (D. C. N. Y., 1950) 28

STATUTES

Section 5 of the Clayton Act, Title 15, U. S. C. A., Sec. 16 ..... 18, 23
Wartime Suspension Act of October 10, 1942 ..... 27, 28